LIBRARY
SUPREME COURT, U.S.
No. 518

SEP 5 - 1952

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement:	
1. The facts	2
2. The Board's conclusions and order	5
3. The decision of the court below	8
Reasons for granting the writ	10
Conclusion	25
Appendix	26

CITATIONS

Cases:

Auto Workers v. *Wisconsin Board*, 336 U. S. 245	21
Bentley, J. A., Lumber Co. v. *National Labor Relations Board*, 180 F. 2d 641	18
Carter Carburetor Corp. v. *National Labor Relations Board*, 140 F. 2d 714	17
Conn v. *National Labor Relations Board*, 108 F. 2d 390	21
Cyril de Cordova & Bro., 91 NLRB 1121	6, 14
Duplex Co. v. *Deering*, 254 U. S. 443	12
Electrical Workers v. *National Labor Relations Board*, 341 U. S. 694	12
Gullett Gin Co. v. *National Labor Relations Board*, 179 F. 2d 499	17
International Longshoremen's and Warehousemen's Union, 79 NLRB 1487	14
Medford Building and Construction Trades Council, 96 NLRB, No. 10	14
National Labor Relations Board v. *Denver Building and Construction Trades Council*, 341 U. S. 675	11
National Labor Relations Board v. *Globe Wireless, Ltd.*, 193 F. 2d 748	18, 19
National Labor Relations Board v. *Illinois Bell Telephone Co.*, 189 F. 2d 124, certiorari denied, 342 U. S. 885	10, 23, 24
National Labor Relations Board v. *International Rice Milling Co.*, 341 U.S. 665	11-12, 14
National Labor Relations Board v. *Kennametal*, 182 F. 2d 817	17, 18, 22
National Labor Relations Board v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 903	21
National Labor Relations Board v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333	18

Cases—Continued

	Page
National Labor Relations Board v. *Montgomery Ward & Co.*, 157 F. 2d 486	21, 22
National Labor Relations Board v. *Service Trades Chauffeurs*, 191 F. 2d 65	13
Newspaper & Mail Deliverers Union, etc., 90 NLRB 2135	14, 19
Olin Industries, Inc. v. *National Labor Relations Board*, 191 F. 2d 613, 192 F. 2d 799, certiorari denied, 343 U. S. 919	17
Peyton Packing Company, 49 NLRB 828	15
Printing Specialties and Paper Converters Union v. v. *LeBaron*, 171 F. 2d 331, petition for certiorari dismissed, 336 U. S. 949	13
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U. S. 793	15, 16
Rockaway News Supply Company, Inc., 94 NLRB 1056	7
United Construction Workers, 94 NLRB 1731	14
United States v. *Hutcheson*, 312 U.S. 219	12

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*):	
Section 2(1)	13
Section 7	10, 11, 12, 14, 15, 26
Section 8 (a) (1)	11, 26
Section 8 (a) (3)	11, 26
Section 8 (b)	14, 26
Section 8 (b) (1)	15, 17, 27
Section 8 (b) (2)	27
Section 8 (b) (3)	27
Section 8 (b) (4)	13, 17, 19, 20, 23, 24, 27
Section 8 (c)	12
Section 10 (a)	29
Section 10 (c)	29
Section 10 (e)	29

Miscellaneous:

Barbash, *Labor Unions In Action* (1948), p. 129	13
93 Cong. Rec. 6859, 2 Leg. History of the Labor Management Relations Act, p. 1623	15
Report of the General Executive Board to the 27th Convention, International Ladies Garment Workers Union, Atlantic City, N. J., May 23-June 1, 1950, pp. 691-692	12

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on May 12, 1952 (R.A. 15-21, 23),[1] denying enforcement of an order issued by the Board against Rockaway News Supply Co., Inc. (B.A. 10-14).

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R.A. 15-21, 21-22) are reported

---

[1] For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the court below, herein designated "R.A.," and the appendix to the Board's brief in the court below, designated "B.A." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief.

at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 7-36) are reported at 95 NLRB 336.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1952 (R.A. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are sent forth in the Appendix, *infra,* pp. 26-30.

STATEMENT

1. *The facts*

Upon the usual proceedings under Section 10 of the Act, the Board, on July 20, 1951, issued its findings of fact, conclusions of law, and order (B. A. 7-36). The facts, which are not in dispute, may be summarized as follows:

Charles Waugh, the employee whose discharge

on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years (B. A. 19; 40).[2] He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees (B. A. 19; 49, 56-60).

Working five days a week (Tuesday through Saturday), from 9:45 a.m. to 6:30 p. m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications (B.A. 20; 42-43). Among his scheduled stops was one at the plant of the Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily Review Star. Before 10:30 a.m. on each of his working days except Saturday, Waugh was required to make this stop to pick up a supply of Review Stars for delivery at subsequent points on his route (B.A. 20; 42, 43, 47). This operation consumed about 10 minutes of each working day on which it was required (B.A. 20; 49).

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of the Daily Review

[2] Where a semicolon appears in a series of record references in this Statement, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Corporation (B.A. 20; 44). Through a telephone call to John J. Byrnes, Vice President of the Typographical Union, he was apprised that this labor organization had ordered the picketing in the prosecution of a long-standing labor dispute with the Daily Review Corporation (B.A. 20; 44-45, 50, 52).

Convinced that the Typographical Union, of which he was not a member, was maintaining "a legal picket line," Waugh went to his foreman, William Gordon, and said that he, "as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker" (B.A. 20; 45). Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job" (*ibid.*). But Waugh reiterated his position, insisting that he had a "right as a union man" not to "harm another union" and suggesting that copies of the Review Star be brought out to him in some way which would not entail his crossing the picket line (B.A. 20-21; 45).

Accepting this suggestion for the moment, respondent arranged to have its consignment of Review Stars brought on that day to its plant at Valley Stream, from which point Waugh took them and proceeded on his route as usual (B.A. 21; 45-46). Again on the next day, Friday, March 3, respondent had the papers brought to Waugh outside the picket line (B.A. 21; 46-47). On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, Foreman Gordon told him that

no arrangements like those of the preceding Thursday and Friday would be made and that respondent expected him to cross the picket line. "Otherwise," Gordon said, "you are fired; if you refuse, you are fired" (B.A. 21; 47-48). Persisting in his refusal to cross the picket line, Waugh left respondent's premises (B.A. 21; 48).

On the following day, Waugh returned to ask for work, but Gordon told him: "You know I can't hire you. You're fired." On each succeeding day for about three weeks Waugh requested in vain that respondent hire him (B.A. 21; 48-49).

Unlike Waugh, other members of the Newspaper and Mail Deliverers' Union did not refuse to cross the Typographical Union's picket line. The picketing members of the latter union expressed their resentment against such action on the two days following Waugh's discharge by carrying placards which read: "Is Waugh the only union mail deliverer?" (B.A. 21; 55-56).

The legality of Waugh's discharge was thereafter submitted to an arbitration board, under the terms of a contract between the respondent and Waugh's union (R.A. 12-13). The arbitration board held that Waugh had violated Section 4 of the contract, dealing with the right of foremen to issue orders, and dismissed the grievance (R.A. 10-11, B.A. 25-26).

2. *The Board's conclusions and order*

Noting that the picketing of the Daily Review Corporation was a legitimate activity by the Typo-

graphical Union, the Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line. Accordingly, the Board concluded, Waugh's discharge for this protected activity was violative of Section 8 (a) (1) and (3) of the Act (B.A. 8-10, 28-30).

It was immaterial, the Board held (B.A. 9-10), that Waugh was not a member of the picketing union, for in "refusing to cross the Typographers' picket line [he] was making common cause and acting in concert with the Typographers." And, the Board pointed out (B.A. 10), the safeguards of Section 7 extend to employees who participate in such activities whether or not they are members of the union directly involved—"or indeed, of any union * * *."

The Board rejected (B.A. 8-9) respondent's contention that Waugh's refusal to cross the picket line constituted a "partial strike" outside the protection of the Act. The record showed, the Board pointed out, "that Waugh's failure to perform part of his duties was not occasioned by an insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or alter his own terms and conditions of employment while remaining at work." In *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board had observed that a refusal to cross a picket line was a traditional kind of action, "time-honored in the history of the American labor movement," and, that an employee's refusal to perform such of his duties as

entail dishonoring a picket line is "not a wilfully contrived violation of plant discipline as a means to an end" but, "rather, a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner." 91 NLRB at 1136. The same analysis, the Board concluded, applied in the instant case. "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B.A. 9). It could not, as it had chosen to do, simply discharge him for engaging in an activity protected by the Act.

The Board also rejected (B.A. 8, 30-32) respondent's argument that its contract with the Newspaper and Mail Deliverers' Union justified Waugh's discharge because (1) Waugh's refusal to cross the picket line had violated the contract's no-strike provision and (2) the Adjustment Board, created by the contract to resolve disputes thereunder, had held the discharge proper. In *Rockaway News Supply Company, Inc.*, 94 NLRB 1056, the Board had found that this identical contract, which contained an unlawful union-security agreement and in other respects discriminated against non-members of the union, was illegal in its entirety and should be given no further effect. Accordingly, the Board held here that respondent could not rely on its unlawful agreement, an instrument of unlawful support rendered to the union with which the

agreement had been made, as authority for its discrimination against Waugh.

The Board therefore ordered respondent to cease and desist from its unfair labor practices, to reinstate Waugh with back pay, and to post appropriate notices (B.A. 10-14).

3. *The decision of the court below*

The court below, Judge Clark dissenting, set aside the order of the Board. Recognizing that "the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of the right 'to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection' which is expressly guaranteed by Section 7 of the Act," the court observed that "such refusal is habitual with union workers," that "it is frequently of assistance to the labor organization whose picket line is respected," and that "it is in a broad but very real sense directed to mutual aid or protection" (R.A. 17). The court held, however, that this right, like the right to solicit union membership on company property, enjoys statutory protection only during non-working hours, for "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment . . ." (R.A. 18).

As a further basis for its decision, the court stated that the Board was "unrealistic" in holding that Waugh could have been treated as an economic striker and replaced, but could not lawfully be dis-

charged (R. A. 20). It would be pointless, the court held, merely to permit the employer to place Waugh in the position of a total striker, since his Union would be precluded by Section 8 (b) (4) (A) from supporting him in such a strike. Consequently, the court stated, Waugh's strike would have been foredoomed to failure, and since his employer would have been free to replace him had he gone on strike, the court saw no statutory violation in discharging him.

Finally, the court noted that although it had assumed that Waugh's refusal to cross the picket line was intended to aid the striking union, it felt that "on the evidence in this case that fact is very doubtful" (R. A. 20-21), since Waugh was willing to distribute the papers if someone else crossed the picket line to obtain them, and appeared to be concerned only with his own standing as a union man.[3]

Judge Clark, dissenting, was of the view that the Board acted within the intended spirit of the proviso to Section 8 (b) (4), which protects the refusal

---

[3] The court below did not pass upon respondent's contention that Waugh's refusal to cross a picket line violated the no-strike clause in the contract between respondent and Waugh's union. As the dissenting judge observed, that issue "has thus been properly removed from the case," the Board having correctly set aside the entire contract because it contained an illegal union-security clause as well as other evidence of illegality (R. A. 22). Moreover, even the Arbitration Board functioning pursuant to the contract did not find that the refusal to cross a picket line violated the no-strike clause; it held only that the discharge was justified under the contractual provision dealing with the power of the foremen to issue orders (R. A. 10, 11, B. A. 25-26). Consequently, no contract issue obscures consideration of the important questions presented here.

of "any person" to enter upon the premises of an employer other than his own when the employees of that employer are engaged in an authorized and lawful strike. Noting that this proviso was not involved in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which arose prior to the enactment of Section 8 (b), Judge Clark stated that in protecting such a refusal only outside working hours, the holding of the majority amounted to "a practical nullification of the statutory provision" (R. A. 22). The dissent also noted that in rejecting as "unreal" the Board's view that Waugh could not be discharged prior to being replaced, the majority departed from the settled rule, "explained clearly and succinctly in *N. L. R. B.* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750" (*Ibid.*), that economic strikers, although vulnerable to replacement, may not lawfully be discharged for striking.

REASONS FOR GRANTING THE WRIT

1. The court below agreed, as the Board had held, that an employee, who refuses in the course of his employment to cross the lawful picket line of a union of which he is not a member at the premises of an employer other than his own, is assisting the striking union and is engaging in a concerted activity with that union for mutual aid or protection within the meaning of Section 7 of the Act.[4]

[4] This view is diametrically opposed to that expressed by the Seventh Circuit in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124, 127-128, certiorari denied, 342 U. S. 885.

While agreeing that the right to engage in such activity is guaranteed to employees by Sections 7 and 8(a)(1) and (3), Nevertheless, it held that that right is protected from employer reprisal only when it is exercised outside working hours. This holding deprives of protection all refusals to cross picket lines which occur in the course of an employee's employment; it permits employees to adhere to the traditional union practice of respecting picket lines only in their capacity as consumers, and never in their capacity as employees. The effect of such a holding is to rob peaceful primary picketing, anywhere but at a retail establishment, of the response it is largely designed to evoke. The decision thus affects virtually every employee who refuses to cross a picket line, and virtually every labor organization which utilizes picketing as a means of enlisting the support of other workers in a labor dispute. Because the question is of manifest importance in the administration of the Act, and because the holding below conflicts in principle with decisions of this Court, the issue should be authoritatively resolved.

2. This Court last year expressly recognized that pickets at an industrial plant seek "to influence * * * employees of [customers] of the [picketed employer] not to cross the picket line" and stated that "such conduct [by the pickets] was no more than was traditional and permissible in a primary strike." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687, referring to *National Labor Relations Board* v. *In-*

ternational Rice Milling Co., 341 U. S. 665. These cases, together with a companion case, *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 703-705, establish that in Sections 7 and 8 (c) of the Act Congress protected the right of labor organizations by peaceful picketing to induce non-members of the picketing union, employed by other employers, to refrain from crossing a primary picket line in the course of their employment.

The decision below denies the protection of the Act to employees who respond by refusing to cross such picket lines in the course of their employment. We submit that the legislative history does not sustain a congressional purpose to protect primary picketing and yet in effect to destroy its potency by withholding protection from employees who heed its appeal. Cf. *Electrical Workers* v. *National Labor Relations Board*, *supra*, 704; *United States* v. *Hutcheson*, 312 U. S. 219, 233-235; *Duplex Co.* v. *Deering*, 254 U. S. 443, 471, 487-488.[5] The refusal of workingmen, in the course of their employment, to cross picket lines is a time-honored tradition of the labor movement.[6] "The reluctance of workers

---

[5] In the *Electrical Workers* case the Court stated, 341 U. S., at 704: "The legislative history does not sustain a congressional purpose to outlaw secondary boycotts under § 8 (b) (4) and yet in effect to sanction them under § 8 (c)."

[6] See *Report of the General Executive Board to the 27th Convention, International Ladies' Garment Workers Union*, Atlantic City, N. J., May 23-June 1, 1950, pp. 691-692:

> Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which

to cross a picket line is notorious." *Printing Specialties and Paper Converters Union* v. *Le Baron*, 171 F. 2d 331, 334 (C. A. 9), petition for certiorari dismissed, 336 U. S. 949.[7] Not only does the Act disclose no purpose to impair the right of workingmen to refuse to cross primary picket lines, but Congress took special pains to insure that its prohibition of secondary boycotts should not inadvertently have the effect of impairing that right. The final proviso to Section 8(b)(4) declares that:

> nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

The proviso clearly recognizes and protects the right of an individual employee to refuse to cross a primary picket line. The term "person" is defined in Section 2(1) as including "one or more individuals," and the use of the phrase "his own employer" in the parenthetical clause shows that Con-

---

alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life.

[7] Cf. *National Labor Relations Board* v. *Service Trades Chauffeurs*, 191 F. 2d 65, 68 (C. A. 2); Barbash, *Labor Unions in Action* (1948), p. 129.

gress contemplated refusals by individual employees. The approval of respect for primary picket lines by individual employees which the proviso manifests must be taken as reflecting Congress' attitude toward the protection of such activities under Section 7. Cf. *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1137; *Newspaper & Mail Deliverers' Union, etc.*, 90 NLRB 2135, 2146-2149.[8] By affirming the immunity of this practice, Congress must be deemed to have intended to make it clear that the protection which the Act extends to primary picketing includes the correlative employee response which such picketing is designed to evoke.

That Section 7 gives statutory protection to the right to respect a picket line during the course of employment is further demonstrated by the settled scope of the correlative right to refrain from the activities therein protected. This Court recognized in the *Rice Milling* case, *supra*, 341 U. S. at 672, that Sections 7 and 8(b)(1)(A) protect employees who desire to cross picket lines from restraint and coercion at the hands of labor organizations. See also *Medford Building & Construction Trades Council*, 96 NLRB, No. 10; *International Longshoremen's and Warehousemen's Union*, 79 NLRB 1487, 1504; *United Construction Workers*, 94 NLRB 1731,

[8] The prohibitions of Section 8 (b) do not apply to employees acting in their individual capacities; they are directed only against labor organizations and their agents. Hence the proviso, as it applies to individual workingmen, cannot mean merely that such conduct does not violate the Act, else it would be superfluous. It can be given effect only by regarding it as a recognition that the right of an individual to refuse to cross a primary picket line is protected by the Act.

1733. Protection of the right to cross derives from the guarantee, in Section 7 of the Act, as amended, of the right "to refrain from" participating in activities protected by that Section. The purpose of the addition was to "make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join, or did not care to participate in a strike or a picket line." 93 Cong. Rec. 6859, 2 Leg. History of the Labor Management Relations Act, p. 1623. Manifestly, the right to cross a picket line is protected only if it is the converse of an already protected affirmative right, *i. e.*, to respect a picket line. If the latter right is not protected, the crossing of a picket line would not constitute "refraining from" exercising a right guaranteed by Section 7, and hence would enjoy no protection against union restraint and coercion. The scheme and structure of these interlocking provisions thus demonstrate that it was Congress' purpose and policy to guarantee to employees the right to decide voluntarily whether or not to cross a picket line and to protect the exercise of that right against both union restraint and coercion and employer reprisal.

3. In holding that the right to refuse to cross a primary picket line, like the right to solicit union membership (*Peyton Packing Co.*, 49 NLRB 828, 843), may properly be exercised only outside of working hours, the court below misconstrued and misapplied the decision of this Court in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793. In that case, the Court rec-

ognized that the rights guaranteed employees by the Act were meaningless unless the Act also assured adequate opportunity to exercise them. In determining how far organizational opportunity should be extended it was pertinent, of course, to consider the impact of such extension upon conflicting interests of the employer. "Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U. S. at 798. The *Republic Aviation* case holds that insofar as the right to solicit union membership on the employer's property is concerned, the balance is appropriately struck by permitting solicitation during non-working time while disallowing it during working time.

However, to impose the "same limitations' upon the very different right to refuse to cross primary picket lines, as the court below did (R. A. 18), is to destroy virtually any opportunity to exercise that right, and thereby to repudiate the basic principle which the *Republic* case vindicates. That case clearly was not intended to draw an universally applicable "distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time" (R. A. 18). A strike, for example, necessarily involves violation of the employer's rules; yet it would hardly be suggested that the right to strike is protected only if it is exercised outside working hours. The right, as an employee, to respect a primary picket line is analogous, in this respect, to the right to strike and in sharp contrast to the right to solicit union member-

ship, in that it can ordinarily be exercised only during working hours. Indeed, a principal objective in picketing an industrial plant is to persuade employees of other employers to refuse to cross the picket line *during* the course of their employment. Moreover, when Congress in the final proviso to Section 8(b)(4) excluded refusals to cross a lawful picket line from the new unfair labor practices of unions and their agents, it was necessarily referring to refusals during working hours, for the only concerted employee refusals to which the prohibitions of Section 8(b)(4) apply are those which occur "in the course of their employment" (Section 8(b)(4)). Similarly, the protection accorded by Section 8(b)(1)(A) to the right of employees to cross a picket line cannot be thought to have been limited to non-working time. The converse right, to respect a picket line, likewise cannot be so limited.

Accordingly, the protection which the Act extends to refusals to cross primary picket lines, like the protection extended to strikes and other concerted activities, must be measured in the context of the exercise of those rights during working hours.[9] Of course, refusal to cross a picket line during working hours may entail partial disobedience of the employer's instructions, and interfere to some

---

[9] Cf. *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3); *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613, 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C. A. 8).

extent with the employer's business. Similar, and far more drastic, consequences attend a strike, but it has never been held that they warrant denial of the Act's protection to strikers. See, *J. A. Bentley Lumber Co.* v. *National Labor Relations Board,* 180 F. 2d 641 (C. A. 5); *National Labor Relations Board* v. *Kennametal,* 182 F. 2d 817 (C. A. 3). In strike cases, where the employee's statutory right can effectively be exercised only during working hours and the exercise necessarily involves interruption of the employer's business, it has long been settled that the conflicting interests are to be reconciled by permitting the employer to continue production by replacing the recalcitrant employees, but precluding him from severing their employment unless and until they have been replaced. *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.,* 304 U. S. 333, 345-346; *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 750 (C. A. 9), and cases cited therein. This distinction between discharge and replacement has important practical consequences, in view of the reluctance of workingmen to risk stigmatization as "scabs" by replacing picketing employees. Such a resolution of the conflicting interests, which has become well settled in cases where the exercise of employee rights results in a total stoppage of work, would seem *a fortiori* appropriate and valid where the exercise results in only a partial cessation of work.[10]

The holding of the court below that because an

[10] Cases cited, note 9, *supra*, p. 17.

employer concededly may lawfully replace an employee who refuses in the course of his employment to cross a primary picket line he may also discharge the employee *prior to replacing him*, thus conflicts in principle with the decisions of this Court and of other Courts of Appeals which are collected in the *Globe Wireless* opinion, *supra*. The inability of the court below to "follow the Board's reasoning" (R. A. 19) stems from the court's fallacious assumption that if respondent had refused to permit Waugh to perform any other services as long as he refused to cross the picket line—as respondent concededly was privileged to do—Waugh would have been in the position of a secondary striker seeking to force his employer not to deal with Daily Review Corporation, a position which, if taken by his Union, would have violated Section 8(b)(4)(A). The court's argument misconstrues Section 8(b)(4) and ignores the proviso to that section. Thus it is clear that, contrary to the court's assumption, Waugh's union could have come to his aid and the members of that union could validly, by concerted action, have joined him in refusal to cross the picket line. The proviso to Section 8(b)(4) expressly provides that it is not a violation of the Act for a labor organization to induce or encourage its members to refrain from crossing a primary picket line authorized by another labor organization at the premises of another employer. *Cf. Newspaper & Mail Deliverers' Union, etc.*, 90 NLRB 2135, 2146-2149. Concededly, the employer could have converted

such a limited refusal to perform services into a complete strike by denying Waugh or any other employee the opportunity to perform those duties which they were willing to perform. In that event, however, the strike would be an involuntary one, and the resultant total stoppage would not have been a concerted "refusal" to perform services within the reach of Section 8(b)(4). Certainly their employer's refusal to permit them to perform other services could not transform their lawful objective into an unlawful one.[11]

4. The court below holds that statutory protection cannot be extended to refusals to cross a picket line during working hours because to do so "would be to permit an employee unilaterally to dictate the terms of his employment, which it is well settled he may not do" (R.A. 18). This holding is based upon a misconception of the objective which underlies employee refusals to cross picket lines. The employee who voluntarily refuses to cross a picket line does so, not in order to change the terms of his own employment, but to assist the picketing union (or to protect his own standing as a union man, an

---

[11] That Waugh's union could lawfully have induced all of its members to do just what Waugh did, thereby lending effective support to his refusal to cross the picket line, refutes the suggestion of the court below that "it is inconceivable that Waugh could have won his strike" (R. A. 20). Faced with such action, respondent may well have been unable or unwilling to replace any of the employees and have acquiesced in their refusal to cross the picket line. In any event, it has never heretofore been suggested that the distinction between discharge and replacement may be ignored as "wholly unrealistic" merely because it appears that the employer may succeed in replacing the striking employees.

aspect of maintaining union membership). His goal remains the same whether his refusal occurs during or outside the course of his employment. When the refusal occurs during working hours, it entails nonperformance of a part of his duties. But this is a consequence, not an aim of his conduct. For this reason, cases like *Conn* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), upon which the court below relied, are wholly inapposite.[12] In *Conn*, simply to effectuate their objective of doing no overtime work, the employees refused to work overtime when instructed by their employer to do so. But where, as here, another objective is shown to motivate the employees, the mere fact that they cease performing a part, rather than all of their duties, as in a full-fledged strike, does not establish that their

---

[12] The court also relied on two Eighth Circuit cases, *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496, and *National Labor Relations Board* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108. Neither case is in point. In *Kopman*, as in *Conn*, the employee in refusing to perform certain work was in fact attempting to prescribe the terms on which he would work. In *Montgomery Ward*, the employer told the employees who refused to work on "struck" goods that they would have to do the work or leave the plant, *i.e.*, assume the position of full-fledged strikers. Only when they refused both alternatives were they discharged. 157 F. 2d, at 496. Respondent here summarily discharged the employee without giving him the alternative of being treated as an economic striker.

Insofar as the protected character of the activity is concerned, the traditional, legitimately motivated refusal to cross a picket line, which is here involved is to be contrasted with the "recurrent or intermittent unannounced stoppage of work to win unstated ends," a "new technique for bringing pressure on the employer" which this Court held unprotected in *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 249, 264.

partial stoppage is an end in itself, or that it is their objective thereby to alter the terms of their employment.[13] Partial, as distinguished from total, stoppages often are, as the Court of Appeals for the Third Circuit stated in *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817, 819, "more reasonable and less productive of loss to all concerned than an outright strike. The language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they assert the maximum economic pressure and call a strike."

It is true, of course, that even where alteration of their terms of employment is not the objective of employees who engage in a partial stoppage, the effect of their conduct from their employer's point of view is to leave them willing to perform some, but not all, of their duties. It is precisely to enable the employer to control production in these situations that the Board permits the employer to require such employees to elect whether they will perform all of their duties or none.[14] Faced with this alternative, if the employees elect to perform none, they are subject to the same vulnerability to replacement as are economic strikers. To go further than this and permit an employer simply to discharge employees for engaging in lawful activities for a lawful purpose is to frustrate completely the statutory protection given these activities.

---

[13] Cases cited note 9, *supra*, p. 17.

[14] See *National Labor Relations Board* v. *Montgomery Ward & Co.*, *supra*, note 12, p. 21.

5. In sum, this case raises a question of grave importance—whether an employee who follows the basic tenet of organized labor and refuses to cross a picket line enjoys statutory protection from discharge for so doing. That question vitally affects virtually every employee and organization in the realm of organized labor. The court below recognized that an employee who respects a picket line is exercising a right protected by the Act, but limited the protection to nonworking time. Thus limited, the right all but vanishes. To support this limitation the court below relied upon a demonstrably erroneous analogy to the prohibition against soliciting union memberships during working hours. In assuming that Waugh's union could not have joined him in respecting the picket line, the court ignored the plain purpose of the proviso to Section 8(b)(4) of the Act. It also erred in apparently treating the right to refuse to cross a picket line as standing on the same footing as attempts by "partial strike" unilaterally to change conditions of employment. In further rejecting as "unrealistic" the Board's holding that the employee could be replaced but not discharged, the decision below is in conflict with heretofore settled authority.

6. In seeking certiorari we are fully mindful of this Court's denial of certiorari in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which, in a different context, also raised the question of the extent to which employees are protected

by the statute when they refuse to cross a picket line. We assume that the denial of certiorari did not reflect consideration of the merits of that question by this Court. However, it may be pertinent to observe that factors which may have militated against a grant of certiorari in the *Illinois Bell* case are absent here. In the first place, an additional question, whether, under the peculiar facts of that case, the refusals improperly tended to usurp the authority of a bargaining agent, was clearly presented and may have influenced the holding of the Seventh Circuit. Secondly, that case presented the question in a less typical posture; refusal to cross the picket line in that case prevented the employees from entering their own place of employment and hence from performing any services for their employer. The significance of the factual distinction is reflected in the fact that the conduct involved in *Illinois Bell* would not have been protected by the proviso to Section 8 (b) (4), (*supra*, p. 13). Moreover, as Judge Clark observed in his dissent in the court below, the *Illinois Bell* case arose prior to the 1947 amendments, and the effect of the proviso to Section 8 (b) (4), itself an important issue in the administration of the amended Act, was therefore not presented in that case. Finally, the court below expressly stated, contrary to the holding in *Illinois Bell*, that a single employee who refused to cross a picket line was exercising the right guaranteed by statute to "assist labor organizations * * * and to engage in other concerted activity for the purpose of * * *

mutual aid or protection" (R. A. 17). Hence, in this case the principal question stated in the petition for certiorari in the *Illinois Bell* case was answered favorably to the Board and in conflict with the views of the Seventh Circuit. That conflict in approach enhances the importance of authoritative resolution by this Court of the question here presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing

in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the Dis-

trict of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *